87 538

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October 1987 Term

BRENDA SIMPSON, ET AL., - - - Petitioners
[LIST OF ALL OTHER PETITIONERS CONTINUED ON NEXT PAGES]

versus

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT - - - - - - - Respondent

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Petition for a Writ of Certiorari to the Supreme Court of Kentucky

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BRIEF FOR PETITIONERS

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[Continued from Front Cover]

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JOHN D. & SHARON M. BORDERS, BERNARD & ELMA E. BURDEN, DELBERT R. VANCE, HELEN RAMSEY, LARRY G. & CECILIA RHODES, MR. & MRS. THOMAS THOMAS, PAMELA R. WEBB,

[Plaintiffs Continued]

MORTON S. BOTTORF AND BETTY G. BOTTORFF, IRVIN R. ERNST AND MRS. IRVIN R. ERNST, BOYD HEMMING AND MRS. BOYD HEMMING, JACQUELINE K. ERNST, MARY TOM TIBBS, FRANK FITZGERALD AND JANE FITZGERALD, LOUISE YATES, LAEL J. THOMPSON, MR. HERSCHEL FRIERSON AND MRS. HERSCHEL FRIERSON, ELMER LUSH AND NELL LUSH, HAROLD MOSBY AND EDNA MOSBY, JUANITA MARSHALL, MICHAEL MARSHALL, JAMES WHITE AND JESSIE WHITE, KATHLEEN JEWELL, BERTRAND L. HILL, SR. AND MARY V. HILL, BERTRAND L. HILL, JR., FLOSSIE ROBERTS, ROBERT L. BUCKNER, JR., RICHARD L. BAKER, ANNA BIBB, FLORINE DOYLE, MARY ALICE COLE, JAMES H. FELZ AND MRS. JAMES H. FELZ, LOIS L. CROOK, CAROL GAHAFER, JUDY GARRETT, HERBERT SELF AND MAYME SELF, EDITH GORE, RUFUS H. MILLER AND MRS. RUFUS H. MILLER, WALTER WILLIAMS, JR., MRS. LEO MOSS FINK, YVONNE DAVIS, LARRY EDRINGTON AND ROSE EDRINGTON.
CHRISTOPHER ADKINS, EDDIE ADKINS, CAROLYN CRAYTON, MONA FREEMAN, DONNA GARDNER, REBECCA HANDLEY, BESSIE ALLEN, ARCHIE BROWN, DORIS JEAN MARTIN, CHARLES G. METCALF, DIANA NICKOLS, CLAYTON OTIS, JULIUS HICKERSON, HUBERT LINDSAY, JR., PATRICIA LOVETT, IDA MARTIN, COLONEL L. MAYO, JR., JOANNE McNEIL, MARY SIMPSON, JOSEPH THOMPSON, WILFRED VAN GORP, BONNA VAN GORP, DONNA WARD, FLORENCE WATKINS.

GENERAL DRIVERS WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89

MILDRED BUTLER, CHARLES AND MARY RAY, MICHAEL AND PEGGY MATTINGLY, MARY CLARK, EUGENE AND ELIZABETH BELL, CLARENCE OLIVER, DENNIS M. AND CHERYL L. FLEMING, JAMES E. AND MARY DUNCAN, CARL THOMAS, SAMUEL A AND LELLA DOYLE DENTON, MARK W. LUCKETT, MARGARET CARROLL, PATRICK AND MARY NEWMAN, RICHARD WATSON, LAURA C. BOOTH, RONDLE AND MAGDALENE SKAGGS AND BETTY NISSEN, CLYDE T. POTTS, JR. AND ADA POTTS, CEBERT P. AND DOROTY MOORE, WOODROW H. AND IRENE WILSON, IRA NUNN, MALISSA P. JOHNSON, BILLY CHILDRESS, ROY C. AND LOUIE MAE DULWORTH, MITCHELL B. AND ANNA R.

[Plaintiffs Continued]

TURNER, CHARLES F. AND LILLIAN GREEN, HOWARD P. PENDERGRAFT, RANDALL PUCKETT, CARL NEWMAN, ROBERT R. AND MARY H. WATSON, WILLIAM H. AND THELMA RENFROW, JAMES AND LEALA GABBERT, MAYME M. SKAGGS, JOHN B. AND ANALOIS TUCKER, CALVIN LEWIS, JR. AND KATHLEEN LEWIS, JOHN JOSEPH MUELLER, JR., LOUISE WATSON, ISADORE AND MARY MILLER, MARVIN L. AND HELEN P. COLLINS, JOHN AND FRANCES GNAU, JONEAL McBRIDE, HOWARD K. AND IRENE ROWE HETTIE R. PAALZ, PHILIP AND DONNA DIBLASI, PAUL E. AND JOANN ASH, JAY AND SARAH FELZ, CHARLES AND MARTHA LAWSON, JOSEPH E. HICKS, HARRY AND LINDA BROWN, ROBERT AND HELEN STRONG, LOUIS W. ULMER, SAM AND LUCILLE PRESTIGIACOMO, PAULA POWERS, GERALD AND RHONDA BLISS, DOROTHY WIEDMAR, JAMES AND GLADYS WIGGINTON, DR. FLOYD AND MADELINE FISH, CLEVELAND AND BETTY COMBS, F. JOYCE GOFF, RAYMOND AND LYDIA HILL, RAYMOND L. HAYDEN, RONALD J. AND PATRICIA WILLEN, HAROLD AND BARBARA KEITH, WILLIAM L. ESAREY, PAUL P. AND JULIA P. COTTON, JOSEPH W. AND VIRGINIA C. CARRITHERS, JEROME L. TUCKER, JR., JAMES E. AND DEBORAH DOWNEY, FRANCES POST, GARY AND SANDRA KEESE, MATTIE CLOSE, COLEMAN AND KATHLEEN THOMAS, ALBERT E. BETZ, FRANCES M. MARTION, ROBERT A. AND VIRGINIA B. MEUER, ROLLIE C. AND CHARLOTTE WALLING, GERALD AND LINDA BROWNING, LUTHER C. BROWNING, ANN M. SANDERS, GARNET W. AND RUBY G. MAHONEY, FRIEL AND JUANITA ARMBRISTER, MARK THOMAS AND MARIA LUCKETT, RUTH HULSEY AND EVA NAST, MELVIN AND CORNELIA HESS, STEPHEN AND JEANNE LENTINI, DANIEL AND BARBARA DILLMAN, DORIS M. SHEPHERD, MERLYN E. AND ELIZABETH GREY, DON AND HELEN ANDERSON, PHILIP AND ANN KOEHLER, MRS. LEO MOSS FINK, INEICE PITTEARD, COMMODORE AND MAE RENFROW, JASPER L. AND ELSIE M. GEORGE, KATHLEEN CUMMINGS, MICHAEL J. AND MARY KAYE STEINMETZ, ROBERT L. AND MARY V. ATER, JAMES AND LILIAN VESSELS, CLIFFORD F. AND LILLIAN M. WILKINSON, CHARLES AND MADELLA SZARKA, DALE

[Plaintiffs Continued]

AND TAMMY TOMS, CLARENCE AND FRIEDA VAN NATTA, ROBERT AND THERESA VAUGHT, MARY E. VAUGHT, HELEN GARRETT, VIVIAN STURGEON, JEFFREY AND MARY LOU KEY, DOROTHY HAGAN, JAMES AND BEULAH SKIPPER, HOUSING AUTHORITY OF LOUISVILLE, ZELPHA WARREN.

VIRGINA BAINES, BARBARA CLARK, BILL TIDWELL, PAM TIDWELL, PAM SLOAN, A. MERIWEATHER, JOI C. BEARD, MR. & MRS. ROBERT AND CHARLSIE BOOKER, MR. & MRS. THOMAS AND JOYCE BLINCOE, MR. & MRS. JAMES LYNN, ANITA WADE, GAYNELL SHUMAKE, FANNIE TAYLOR, MR. & MRS. E. H. BROWN, TAAJ L. UTHMAN, RUFUS CLARK, ROBIN TIDWELL, MR. & MRS. KENNETH ZAX, JR., MARJORIE MIMMS, SHIRLEY MOORE, EVELYN CARR, MR. & MRS. LEVY GOODMAN, MR. & MRS. GEORGE YOUNG, JAMES WRIGHT, MR. & MRS. HENRY HAYNES, LEONA WEBB, MARQUERITE PRYOR, JUDY FREEMAN, TONY BRIGHTWELL, JOHN THURMOND, MARIA THURMOND, DAVID ATCHLEY, GWEN ATCHLEY, INSURANCE COMPANY OF NORTH AMERICA,* THE B.F.GOODRICH COMPANY,* Individually.

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*Rule 28.1 listing is contained in Entry of Appearance filed with this Brief for Petitioners.

QUESTION PRESENTED FOR REVIEW

Whether the Fifth and Fourteenth Amendments to the United States Constitution require a trial on the merits for claims arising from the destruction of and damage to real and personal property without just compensation by a governmental entity held by the highest state court to have sovereign immunity.

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IN THE

SUPREME COURT OF THE UNITED STATES

October 1987 Term

BRENDA SIMPSON, ET AL., - - - *Petitioners*
[LIST OF ALL OTHER PETITIONERS CONTINUED ON PRECEDING PAGES]

v.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR PETITIONERS

PARTIES TO THE PROCEEDING

All parties to this proceeding are contained in the caption of the case.

OPINIONS DELIVERED IN THE COURTS BELOW

The Jefferson Circuit Court, Commonwealth of Kentucky, entered summary judgment (Appendix, p. 24a) on June 19, 1984, dismissing Petitioners' first amended consolidated complaint against the Respondent. (Appendix, p. 57a) (As the exhibits to the first amended consolidated complaint are voluminous, Petitioners have not included them in the Appendix at this

time, but will provide them if necessary.) On June 7, 1985, the Kentucky Court of Appeals rendered an opinion (Appendix, p. 21a) reversing and remanding for a trial on the merits. On April 30, 1987, the Supreme Court of Kentucky rendered an opinion (Appendix, p. 1a; 730 S. W. 2d 939 (Ky. 1987)) reversing the Kentucky Court of Appeals. On July 2, 1987, the Supreme Court of Kentucky denied a petition for rehearing. (Appendix, p. 28a)

JURISDICTIONAL STATEMENT

Petitioners invoke this Court's jurisdiction to review by writ of certiorari the judgment entered on April 30, 1987, by the Supreme Court of Kentucky. with respect to which judgment that court denied a petition for rehearing on July 2, 1987. The Petitioners' grounds are that said judgment deprives Petitioners of their rights to a trial on the taking of their property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

"[N]or shall private property be taken for public use, without just compensation."

United States Constitution, Fourteenth Amendment:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Civil Rights Act of 1871, Title 42 U.S.C. Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the partly injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This petition for a writ of certiorari stems from a 4-3 decision of the Supreme Court of Kentucky, holding that the Respondent, Louisville and Jefferson County Metropolitan Sewer District [hereinafter "MSD"], is a "political subdivision" with immunity from claims for destruction of and damage to Petitioners' property. The case involves a class action on behalf of nearly 2,000 persons whose real and personal property located in Louisville and southwest Jefferson County, Kentucky, was destroyed or damaged by flooding caused by MSD's actions.

Specifically, on May 1, 1983, Petitioners' property was flooded as a result of a malfunction of MSD's sluice gates at its Southwestern Pumping Station. This flood

was not the first time that MSD's sluice gates had caused flooding of Petitioners' property. The first flooding occurred on December 6, 1977. MSD had built the sluice gates in 1975 to prevent flooding of MSD's *own property*. Before the construction of the sluice gates, Petitioners did not have any practical risks of flooding to their property.[1]

Petitioners alleged that the evidence would show that both the 1977 and 1983 floods were caused by two basic defects in MSD's sluice gates. Moreover, the 1977 flood had given MSD actual notice of the defects in its gates. After the 1977 flood, MSD's liability insurer analyzed the sluice gates system and made several recommendations to MSD for preventing similar floods in the future. MSD ignored these corrective recommendations, however, and the 1983 flood occurred, destroying and damaging Petitioners' property. Petitioners contend that this destruction and damage were directly caused by the actions of a governmental entity.[2]

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[1]Flooding had not occurred before MSD's 1975 construction of the sluice gates because when the volume of storm water and sewage in the drainage area exceeded the capacity of MSD's pumping station, the pumps would shut down and the storm water and sewage would flow over a diversion weir in the outflow sewer and from there directly into the Ohio River.

[2]Chapter 76 of the Kentucky Revised Statutes, passed by the General Assembly of the Commonwealth of Kentucky, authorized the creation of a joint metropolitan sewer district "in the interest of the public health and for the purpose of providing adequate sewer and drainage facilities in and around each city of the first [Louisville] and second classes and in each county [Jefferson]

(Footnote Continued on Next Page)

In count I of the first amended consolidated complaint, Petitioners claimed that MSD's construction, maintenance, and operation of its sluice gates wrongfully, unlawfully, and unconstitutionally took, damaged, and otherwise devalued Petitioners' Common law right of drainage as recognized under Kentucky law. (Appendix, p. 59a)[3] In count VIII, Petitioners alleged that MSD's actions violated 42 U.S.C. § 1983 by depriving Petitioners under color of state law of their right and privilege to hold property. Appendix, p. 59a) In Petitioners' brief filed in Jefferson Circuit Court, they argued that if MSD is a sovereign entity as alleged, its actions constituted "inverse condemnation." (Appendix, p. 30a)

In Petitioners' brief in the Court of Appeals of Kentucky (Appendix, p. 38a), they supported their constitutional argument by citing *Lehman* v. *Williams,* 193 S. W. 2d 161 (Ky. 1946). There, the then highest court of Kentucky relied, in part, on the Fifth and Fourteenth Amendments to the United States Constitution in reversing the trial court's dismissal of a com-

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(Footnote Continued From Preceding Page)

containing such city. . . ." KRS 76.020. Pursuant to the state's legislative authorization, the legislative body of Louisville declared by ordinance that such district be created and joint proceedings with the county judge/executive of Jefferson County thereafter effectuated the creation of MSD.

[3]Throughout this portion of the Petition, Petitioners have included within the Appendix only those portions of the complaint, memoranda, and briefs specifically relating to the unconstitutional taking issue so as to avoid burdening this Court with Petitioners' other grounds under state law.

plaint seeking compensation for an alleged taking. *Id.* at 163. In the instant action, however, the Kentucky Court of Appeals relied on a recent decision by the Supreme Court of Kentucky and did not address Petitioners' federal constitutional argument.

In Petitioners' brief in the Supreme Court of Kentucky (Appendix, p. 46a), they again cited constitutional cases, including *Lehman* v. *Williams.* Following the 4-3 adverse decision to the Petitioners, they filed a petition for a rehearing in which they again relied upon constitutional arguments, including specific reference to the Fifth and Fourteenth Amendments. (Appendix, p. 55a) In neither its two and one-half page majority opinion nor its one sentence denial of the petition for rehearing did the Supreme Court of Kentucky refer to Petitioners' federal or state constitutional arguments on inverse condemnation.

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

Fundamental precepts of the Fifth Amendment's "taking clause" require that Petitioners be allowed their "day in court" to show that an unconstitutional taking of their property occured by a governmental entity, albeit one now cloaked with sovereign immunity by the Supreme Court of Kentucky. It is well established that the Fifth Amendment's prohibition applies against the States through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U. S. 155, 160 (1980); *Penn Central Transportation Co.* v. *New York City,* 438 U. S. 104, 122, *reh'g denied,*

439 U. S. 883 (1978); *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago*, 166 U. S. 226, 239 (1897).

Here, the decision by the Supreme Court of Kentucky granting sovereign immunity to MSD has denied 2,000 citizens their federal constitutional right to show a taking of their property. Therefore, within the spirit of Supreme Court Rule 17.1(c), Petitioners urge this Court to settle an important question of federal constitutional law: namely, that destruction and damage to property of citizens of the United States by a state governmental entity requires an opportunity to show that a "taking" occurred, for which just compensation is due, rather than protection from that requirement by way of a state-created immunity.

CONCLUSION

Based on Petitioners clear constitutional rights to just compensation for a governmental taking of their property, Petitioners respectfully pray that this Court issue a writ of certiorari and hear Petitioner's arguments that they are entitled to a trial on the merits in the Jefferson Circuit Court, Commonwealth of Kentucky.

Respectfully submitted,

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APPENDIX

APPENDIX

RENDERED: April 30, 1987
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

85-SC-688-DG

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT - - *Appellant*

v.

BRENDA SIMPSON, ET AL. - - - - *Appellees*

On Review From Court of Appeals
84-CA-2171-MR
(Jefferson Circuit Court — 83-CI-04865, 83-CI-03403, 83-CI-05694, 83-CI-90127, 83-CI-07974, 83-CI-09870, 83-CI-05917, and 84-CI-00281)

OPINION OF THE COURT BY JUSTICE STEPHENSON REVERSING

The trial court granted the Louisville and Jefferson County Metropolitan Sewer District a partial summary judgment on the basis of sovereign immunity. The Court of Appeals reversed for a trial on the merits. We granted discretionary review and reverse the decision of the Court of Appeals.

The Metropolitan Sewer District maintains storm and sanitary sewer facilities for the City of Louisville and Jefferson County. The District was created pursuant to KRS 76.010 which provides:

> In the interest of the public health and for the purpose of providing adequate sewer and drainage

> facilities in and around each city of the first and second classes and in each county containing such city, there may be created and established a joint metropolitan sewer district under the provisions of KRS 76.010 to 76.210, having the powers, duties and functions as herein prescribed, to be known by and under the name of . . . . . (Name or city of the first or second class) and . . . . . (Name of county) metropolitan sewer district, which district under that name shall be a public body corporate, and political subdivision, with power to adopt, use, and alter at its pleasure a corporate seal, sue and be sued, contract and be contracted with, and in other ways to act as a natural person, within the purview of KRS 76.010 to 76.210. (Enact. Acts 1946, ch. 104, § 1; 1968, ch. 152, § 50.)

In accordance with the provisions of KRS 76.090(2), the District finances its public health responsibilities through user charges approved by both the county and the city. It is governed by a Board jointly appointed by the county and the city under authority of KRS 76.170.

The District constructed a facility in southwest Jefferson County with sluice gates which open to allow water to be diverted to the Ohio River during heavy rainfall. This lawsuit was occasioned by flooding of appellees' property when the sluice gates failed to open after a heavy rainfall. The appellees allege that the District negligently designed, maintained, and operated the sluice gates, the result of which caused damage to their property by flood waters. The trial court dismissed the claims of the appellees against the District on the basis of sovereign immunity. The Court of Appeals reversed for a trial on the merits, relying upon *Gas Service Co., Inc.* v. *City of London,* Ky., 687 S.W. 2d 144 (1985). We are of the opinion that the holding in *Gas Service* does not apply to the present case. *Gas Service* held that a city (municipal corporation) is no longer

immune from suit for tort liability. The line of cases overruled in *Gas Service* involved cities. The District here is not a city. In *Gnau* v. *Louisville and Jefferson County Metropolitan Sewer District,* Ky., 346 S. W. 2d 754 (1961), we held that the District was an agency of the state with the immunity of the Commonwealth. *Cullinan* v. *Jefferson County,* Ky., 418 S. W. 2d 407 (1967), held that Jefferson County is a political subdivision of the Commonwealth and, as such, is an arm of the state government and that it, too, is clothed in sovereign immunity.

The legislature, by statute, has declared the District to be a *political subdivision.* It is, at least, partially an arm of the county. Whatever the District may be, it is not a city, and we are of the opinion *Gas Service* should not be extended to cover the District and strip it of immunity to tort liability.

As a matter of policy, the long-standing immunity of the District will not be disturbed by this court in the absence of a change in policy by the legislature.

The decision of the Court of Appeals is reversed, and the judgment of the trial court is affirmed.

Stephens, C.J., and Gant, Stephenson, and Vance, JJ., concur.

Lambert, Leibson, and Wintersheimer, JJ., dissent and file separate dissenting opinions.

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DISSENTING OPINION BY JUSTICE LAMBERT

In *Gnau* v. *Louisville & Jefferson County Metropolitan Sewer District,* Ky., 346 S. W. 2d 754 (1961), we held that the limited waiver of immunity of the Board of Claims Act did not include MSD. The Court stated:

> [T]he waiver of immunity attaches only to those agencies which are under the direction and control of the central State government and are supported by monies which are disbursed by authority of the Commissioner of Finance out of the State treasury.

As MSD was not such an agency, we held that it was not subject to the jurisdiction of the Board of Claims.

Later in *Haney* v. *City of Lexington,* Ky., 386 S. W. 2d 738 (1964), this Court abolished municipal tort immunity except for legislative or judicial functions. Prior to *Haney,* we held in *Rash* v. *Louisville & Jefferson County Metropolitan Sewer District,* 309 Ky. 442, 217 S. W. 2d 232 (1949) that:

> The Metropolitan District is a separate entity acting for its own purposes and possessing defined, though limited, powers of a municipal community. It meets the conventional descriptions or definitions of a "municipality."

Relying on *Haney, supra,* we held in *Louisville & Jefferson County Metropolitan Sewer District* v. *Kirk,* Ky., 390 S. W. 2d 182 (1965):

> Metropolitan next asserts the trial judge erred in overruling its motion for a directed verdict for the reason that this action was essentially one based upon negligence and that, since Metropolitan has been held to be a governmental functionary, Gnau v. Louisville and Jefferson County Metropolitan Sewer District,

> Ky., 346 S. W. 2d 754, it is protected from liability for its torts by the doctrine of immunity. This defense (municipal tort immunity) is now unavailing because this doctrine was abolished in Kentucky, insofar as it attaches to a public agency such as appellant by the recent case of Haney v. City of Lexington, Ky., 386 S. W. 2d 738.

If any doubt remained as to the abolition of municipal tort immunity in *Haney,* such was removed by our holding in *Gas Service Co., Inc.* v. *City of London,* Ky., 687 S. W. 2d 144 (1985).

MSD now comes before this Court arguing that it is entitled to immunity as a quasi-municipal corporation and relies upon *Fawbush* v. *Louisville & Jefferson County Metropolitan Sewer District,* Ky., 240 S. W. 2d 622 (1951). In view of *Rash* and *Kirk,* I disagree with this contention.

On the basis of the majority opinion in the case at bar and *Gnau,* MSD has achieved the exalted status of being immune from liability for its tortious conduct in any forum. I do not believe this is an accurate interpretation of the legislative act authorizing the creation of MSD or of the Constitution of Kentucky.

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent. Reading the majority and other dissenting opinions clearly shows that the beat-goes-on. The scope of governmental immunity is far from being resolved. The ink is barely dry on *Gas Services Co. Inc.* v. *City of London,* Ky., 687 S. W. 2d 144 (1985) and the exceptions predicted in the dissent begin and certain immunities were preserved in *Gas Services* itself.

It is my opinion that we should adhere to the *Gas Services, supra,* decision to provide stability in the law despite

the debatable proposition as to whether a municipal corporation as a generic entity is stripped of immunity or if liability attaches only to a city as a municipal corporation. For good or ill, *Haney* v. *City of Lexington,* Ky., 386 S. W. 2d 738 (1964) set the pattern and *Gas Services* followed it. Another reason I dissent is because the affirmation of a partial summary judgment does not contribute to the disclosure of the identity of the tort-feasor if any exists. The dissent in *Gas Services* properly acknowledged the limited concept that liability follows negligence and suggests that a case could be tried against the actual individual committing the tort. The legal process should seek the true wrongdoer, if any.

In my view, individual responsibility has been overlooked in the rush to find a deep-pocket. Any corporation, municipal or otherwise, can act only through its agents or employees. Recovery should first be sought against the active wrongdoer. The conduct of those agents and employees must first be examined before any claim can be sustained against the principal corporation. Therefore, I would not affirm a summary judgment in this field which has not included a careful review of the responsibilities of both principal and agent or employee. In this case, the manufacture and design of the sluice gates may also play an important role in ascertaining responsibility.

Cities should not be treated differently from other governments, special districts or municipal corporations. If the conduct complained of amounts to negligence and is not protected by the exercise of valid legislative or executive judgment, then liability could result.

As I noted in my concurring opinion in *Gas Services,* the only valid exercise of government which should be exempt from tort liability is the purely administrative or legislative decision-making process. Redress from the exercise of poor judgment is at the ballot box. Compensa-

tion for the failure to exercise ordinary care under all the circumstances is obtained by damages.

The ultimate answer may be from the general assembly which might aid the people who have incorporated into municipalities by enacting a realistic and comprehensive tort claims act which would recognize the specific differences of particular units of government, acknowledge the source of funds as tax money or service charges and provide for a method of compensation to victims of wrongful conduct.

DISSENTING OPINION BY JUSTICE LEIBSON

Respectfully, I dissent.

Shakespeare described brevity as the soul of wit. This may be true in many situations, but the majority opinion in this case is not of them. The opinion is barely two and half pages, double spaced, and fails both to address the facts of the case and to offer reasoned analysis of the law applicable to those facts. Brevity is no virtue when it obscures or omits the *ratio decidendi*. The brief opinion in the present case papers over the cracks by failing to address them. We will do so in this dissent.

This is a class action on behalf of persons who were victims of flooding of their property located in southwest Jefferson County, flooding allegedly caused by the negligence of the Louisville and Jefferson County Metropolitan Sewer District ("MSD") in the maintenance and operation of its facilities. Their property is within MSD's Southwestern Outfall Drainage area.

This case was decided in the trial court on summary judgment for the defendant, MSD, so for purposes of our decision we must take as true the facts as presented by the plaintiff. CR 56. Those facts are as follows:

Appellees are members of a class of nearly 2,000 persons who own property located in the low lying terrain near

the Bells Lane and the Belquin/Penway areas of Jefferson County and Louisville, Kentucky. This property was flooded on May 1, 1983 by the malfunction of MSD's sluice gates at its Southwestern Pumping Station. This was the *second* occasion that this flooding had occurred, having previously occurred on December 6, 1977, for practically identical reasons.

The sluice gates were built in 1975 to prevent flooding of MSD's own property at its Southwestern Pumping Station. Before the construction of the gates in 1975, the appellees bore no practical risk of flooding. Before 1975, if the volume of storm water and sewage in the drainage area exceeded the capacity of the pumping station, the pumps would shut down and the storm water and sewage would flow over a diversion weir (a low dam) in the outflow sewer and from there on to the Ohio River.

In 1975 the sluice gates were designed and built to close to protect MSD's facilities. The appellees' evidence is that both the 1977 and 1983 floods were caused by two basic defects in the sluice gates which (1) caused the electric motors to fail at a certain stage and (2) provided no backup system to assure that the gates could then be quickly opened or bypassed in some other manner. In such a situation, because of the backup of drainage, flooding will occur almost inevitably. There is no method available for opening the gates except by sixteen hours of hard cranking.

The 1977 flood provided MSD with *actual* notice of the defects in its sluice gates. Nonetheless, MSD failed to correct these defects, which resulted in the appellees' being flooded a second time on May 1, 1983. After the 1977 flood MSD's liability insurer[1] analyzed the sluice gate "system"

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[1]MSD presently has a different liability insurer. If we sustain the argument that it has "sovereign immunity," we have placed that insurance company in the enviable position of selling insurance that pays no benefits.

and made several recommendations in an attempt to prevent a similar flood from occurring in the future. These recommendations were largely ignored by MSD.

This case was decided at the trial level before our recent decision in *Gas Service Co., Inc.* v. *City of London,* Ky., 687 S. W. 2d 144 (1985). The *Gas Service Co.* case reaffirmed our holding in an early case, *Haney* v. *City of Lexington,* Ky., 386 S. W. 2d 738 (1964), abolishing municipal immunity from tort liability except for "a narrowly defined exception to liability" for legislative or judicial functions, a "narrow exception" which is not involved in the present case, not even remotely.

The fact situation in the *Gas Service Co.* case fits squarely with the present case because both involve negligent installation and maintenance of a sewer facility maintained by a municipal corporation, one a city and the second a local sewer district. The only arguable distinction is that MSD is not a municipal corporation. This is an argument long since disposed of in *Rash* v. *Louisville and Jefferson County Metropolitan Sewer District,* 309 Ky. 442, 217 S. W. 2d 232 (1949), the landmark case establishing the constitutionality of this type of governmental agency, sewer districts, and defining their status as "distinct municipal corporations." 217 S. W. 2d at 236.

> "The Metropolitan District is a separate entity acting for its own purposes and possessing defined, though limited, powers of a municipal community. It meets the conventional descriptions or definitions of a 'municipality.' " *Id.*

Tort liability for a municipally operated sewer system has not been barred by any form of government immunity since it was abolished in the *Haney* case. 386 S. W. 2d at 740. It was partially resurrected in a different guise in *City of Louisville* v. *Louisville Seed Co.,* Ky., 433 S. W. 2d

638 (1968), which has now been recognized as specious and overruled in the *Gas Service Co.* case. 687 S. W. 2d at 148-50.

Before *Haney* a municipal corporation had a limited form of governmental immunity for certain activities court classified as "governmental" rather than "proprietary" in nature. This was a judicially created common law type of immunity, *not* connected in any way to the concept of state sovereign immunity, a type which our Court has recognized as constitutionally protected by our Kentucky Constitution, § 231.

At the trial level the present case was decided before our Supreme Court decision in the *Gas Service Co.* case. The Court of Appeals reversed the decision, and quite properly so, in conformity with our holding in *Gas Service Co.* Now in our Court the majority disavows our recent holding in the *Gas Service Co.* case before the ink is dry. Its language is inherently contradictory:

> "Gas Service held that a city (municipal corporation) is no longer immune from suit for tort liability. . . . The District here is not a city." sl. op. p. 3.

The term "municipal corporation" is put in parenthesis after the word "city" as if "city" and "municipal corporation" were coextensive, and a "city" is the only form of "municipal corporation." On the contrary a "municipal corporation" means nothing more than a local government entity created by the state to carry out "designated functions. *Rash* v. *Lou. & Jefferson Co. Met. S. District, supra* at 236. Not until now have we ever suggested that a city is the *only* form of municipal corporation, and to so state is *expressly* contrary to the holding in *Rash.* Quite obviously the present case doesn't turn on the fact that MSD is not a city as was the appellee, *City of London,* in the

Gas Services Co. case, because this qualifies as a distinction without a difference.

Our Court in *Haney, supra,* in 1964, set its course squarely against the common law doctrine of governmental immunity, except in the limited situation where the Kentucky Constitution requires it:

> " 'There is probably no tenet in our law that has been more universally berated by courts and legal writers than the governmental immunity doctrine.'
>
> . . . [W]hen a theory supporting a rule of law is not grounded upon sound logic, is not just, and has been discredited by actual experience, it should be discarded, and with it, the rule it supports. . . . 'The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia.' " 386 S. W. 2d at 739.

Taken as true, the facts of the present case represent serious wrongdoing by a local government entity, MSD, causing extensive damage to its neighbors, wrongdoing that shall go uncompensated because we now extend § 231 of our Kentucky Constitution to require such a result. However, the express language of § 231 provides only:

> "*Suits against the Commonwealth.*—The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."

Does the word "Commonwealth" in § 231 cover municipal corporations? Only if we disregard the historical distinction between sovereign states and local governmental entities. *Restatement (Second) of Torts,* §§ 895B and 895C. And only if we disregard § 231's constitutional genesis as a corollary to § 230. See Debates, Constitutional Convention 1890, Vol. 4, pp. 5977, 6048.

Section 231 is juxtaposed upon Section 230, which provides in its inception:

> "*Money not to be drawn from treasury unless appropriated*—No money shall be drawn from the State Treasury, except in pursuance of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published annually."[2]

Section 231 was intended to provide a window of opportunity to the General Assembly to use to waive the state's sovereign immunity, so that "suits may be brought against the Commonwealth" without violating § 230. It says nothing *per se* about sovereign immunity, and nothing even by inference about municipal immunity. It defies logic to infer from § 231 intent to constitutionalize sovereign immunity for local governmental entities which do not fall within the term "Commonwealth," entities which are not funded by money "drawn from the *State Treasury*." When § 231 refers to the "Commonwealth," it is only logical to assume it means agencies of the "Commonwealth" funded from the same "State Treasury" referred to in § 230. MSD is, of course, a governmental entity funded independently of the "State Treasury."

The General Assembly was given power in the Constitution to waive common law state sovereign immunity, an immunity which derived from our legal inheritance from the sovereign power of the King of England. On the other hand, in 1891 municipal corporations were already well recognized as a horse of a different color. In *Prather* v.

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[2]This is § 230 as adopted in 1891. Some additional restrictive language relative to restricting the use of money derived from gasoline taxes and motor vehicle fees was added by an Amendment ratified in 1945.

City of Lexington, 52 Ky. (13 B. Mon.) 559, 560 (1852), our Court stated:

> "Where a particular act, operating injuriously to an individual, is authorized by a municipal corporation, by a delegation of power either general or special, it will be liable for the injury in its corporate capacity, where the acts done would warrant a like action against an individual."

Prather upheld liability for failure to keep "sewers of the city in proper repair." Our constitutional forebearers would be astonished to find that we now find in the words of § 231 an intention to extend state sovereign immunity to shield a municipal corporation from responsibility for the consequences of its own wrongdoing. Section 231 was written with the state and the State Treasury in mind, and nothing else can be reasonably inferred.

Those among us with passing familiarity with the proceedings of our 1890 Kentucky Constitutional Convention acknowledge that the moving force behind the wording of the various provisions of our state constitution was to protect our people from abusive exercise of power by the government. There was no intention to provide governmental agencies with the means to wrong our citizens with "immunity." The published Debates from the Constitutional Convention of 1890 are replete with examples of this underlying philosophy, with no voice to the contrary. *See* Debates, *Constitutional Convention,* 4 Volumes, *supra.*

All this has been better stated by Justice Palmore in his dissenting opinion in *Cullinan* v. *Jefferson County,* Ky., 418 S. W. 2d 407, 411 (1967), "sovereign immunity should be limited strictly to what the Constitution demands, for the simple reason that in a civilized society it is morally indefensible."

The majority opinion in the present case cites the *Cullinan* case as authority for the fact that our Court has held that county government, as well as state government, is protected by state sovereign immunity. It is debatable that this holding can be constitutionally justified, but, nevertheless, there is a *bright line* distinction between counties, which are historical units preexisting the Commonwealth, and municipal corporations which owe their existence to an act of the General Assembly. The county as a unit of government and a "sovereign" of sorts existed long before the state was formed. The distinction between municipal corporations and counties is recognized and commented on in *Restatement (Second) of Torts*, § 895C, Comment a:

> "Under the governmental structure of some States, however, certain types of geographic subdivisions, such as counties and school districts, have been held to be entitled to any broader immunity (either from suit or from tort liability) that has been retained for the State itself, rather than being subjected to the type of liability that is applicable to cities and towns."

It is not inconsistent with the *Cullinan* case to classify MSD as a municipal corporation liable for its torts because there is an historical (if illogical) precedent for treating the county differently from other local government entities created by the State. However, it is both morally and logically indefensible to deny MSD's status as a municipal corporation, as we so held in the *Rash* case, or to provide it immunity when it was negligent in the same manner for which the City of London was held liable in the *Gas Service Co.* case.

No case in Kentucky has ever held MSD, or a like entity, to be immune under § 231. On the other hand, since *Haney* v. *City of Lexington, supra,* there is at least one case hold-

ing a local entity like MSD subject to tort liability rather than immune from it. In *Stephenson* v. *Louisville & Jefferson Co. Board of Health,* Ky., 389 S. W. 2d 637 (1965), the Louisville & Jefferson Co. Board of Health was sued for negligence in the delivery of hospital services. Our Court expressly rejected the same argument which MSD now presents, the claim that *Haney* did not apply because the Board of Health was a subdivision of the State and partially of county government. In *Stephenson* we state:

> "It seems clear that the Board of Health is a municipal corporation. 37 Am.Jur., Municipal Corporations, § 3 (p. 618). *In this respect it is in the same category as the Louisville & Jefferson Co. Metropolitan Sewer District* and the Louisville & Jefferson Co. Air Board. See Rash v. Louisville & Jefferson Co. Met. S. Dist., 309 Ky. 442, 217 S. W. 2d 232; Johnson v. City of Louisville, Ky., 261 S. W. 2d 429; Louisville & Jefferson Co. Air Board v. American Air Lines, Inc., D.C., 160 F. Supp. 771 (rev'd on other grounds, 6th Cir., 269 F. 2d 811). Since it is such a governmental unit, it falls squarely under the decision in Haney v. City of Lexington, Ky., 368 S. W. 2d 738 (decided May 22, 1964), and consequently cannot claim governmental immunity." 389 S. W. 2d at 638. [Emphasis added.]

Considering the fact that the holding in the *Stephenson* case is that the state's governmental immunity does *not* extend to the Board of Health, and that "it is in the same category as the Louisville and Jefferson County Metropolitan Sewer District," it is difficult to accept that the majority opinion fails to address the case.

Another 1965 case, *Louisville & Jefferson County Met. Sew. Dist.* v. *Kirk,* Ky., 390 S. W. 2d 182 (1965), also makes the point that MSD, as a municipal corporation was and is liable under *Haney*:

> "Metropolitan [MSD] next asserts the trial judge erred in overruling its motion for a directed verdict for the reason that this action was essentially one based upon negligence and that, since Metropolitan has been held to be a governmental functionary, *Gnau* v. *Louisville and Jefferson County Metropolitan Sewer District,* Ky., 346 S. W. 2d 754, it is protected from liability for its torts by the doctrine of immunity. This defense is now unavailing because this doctrine was abolished in Kentucky, insofar as it attaches to a public agency such as appellant, by the recent case of *Haney* v. *City of Lexington,* Ky., 386 S. W. 2d 738." 390 S. W. 2d at 185.

MSD claims that this paragraph in the *Kirk* case is only dicta. There were two theories of liability pursued in the *Kirk* case, one tort and one contract, and whether liability was premised on one or the other, or both, is not clear. What is clear is that the quoted paragraph is squarely in point in the present case, and the majority opinion has simply ignored it.

The majority opinion relies for authority primarily, if not exclusively, on *Gnau* v. *Louisville & Jefferson County Metropolitan Sewer District,* Ky., 346 S. W. 2d 754 (1961). *Gnau* was decided before the *Haney* case. While there is language in the *Gnau* case which seems to support MSD's position, the truth is that the *Gnau* case decided a different issue and the *holding* in the *Gnau* case should lead us to the opposite conclusion. *Gnau* did not hold that the claimant could not sue MSD for negligence in a court of law. It held that the claimant could not seek damages from MSD in the Board of Claims. The stated reason for the holding was that the jurisdiction of the Board of Claims under the Act was limited to "negligence on the part of the Commonwealth [and] any of its departments or agencies." and MSD

did *not* qualify as "a state agency as the term is employed in KRS 44.070," the Board of Claims Act. The court states:

> "[T]he waiver of immunity [in the Board of Claims Act] attaches only to those agencies which are under the direction and control of the central State government and are supported by monies which are disbursed by authority of the Commissioner of Finance out of the State Treasury."

Thus the *Gnau* case decided that MSD is *not* an agency of "central State government" funded "out of the State Treasury," covered by sovereign immunity which was partially waived in the Board of Claims Act. It is true that the court comments in the *Gnau* opinion on the fact that MSD is "a public agency performing a governmental function and thus entitled to immunity from liability for its negligence," but this is referring to the immunity formerly enjoyed by a municipal corporation when "performing a governmental function," for which it cited *Fawbush* v. *Louisville & Jefferson County Met. Sew. Dist.*, Ky., 240 S. W. 2d 622 (1951). MSD's immunity as a municipal corporation performing a governmental function, recognized in *Fawbush* and referred to in *Gnau,* was abolished in 1965 in the *Haney* case. Once again, the majority opinion in the present case simply fails to address these pertinent facts.

A fair reading of the *Gnau* opinion leads to only one conclusion, viz., when it refers to MSD as a state agency, it means only in the broad sense that every municipal corporation is a state agency because the state is the sovereign that creates *municipal corporations.* What *Gnau* really says about these municipal corporations is that:

> "They are all indeed agencies of the State in that they perform the particular governmental duties delegated to them, but at the same time they are fairly insulated from the day to day control of the central government and, on the other hand, the state treasury, from which this claim is sought to be paid under the statute here, is fairly insulated from the demands made upon these public corporations." 346 S. W. 2d at 755.

The claim that the decision in the present case is consistent with authority simply cannot be documented. This case will not be viewed by the legal community as the application of *stare decisis*. Analysis of the holding in *Gnau* should lead to the opposite result than the one reached in this opinion. When *Gnau* refers to MSD's immunity from tort liability, it refers to "common law immunity" not constitutional immunity, and common law immunity for municipal corporations went out with *Haney* v. *City of Lexington* in 1965, unless the majority has decided to resurrect it, *sub silentio,* in the present case.

It makes no sense to distinguish the present case from the *City of London* v. *Gas Services Co.* case. This kind of arbitrary immunization of a municipal corporation from the consequences of its wrongdoing can only encourage the abuse of power.

It is difficult to escape the conclusion that the reason underlying our decision in this case is not judicial deference to a constitutional principal but a misguided perception of financial expediency to protect the funds of municipal corporations. If the law is to take this direction, it is a major backward step. Turning again to Justice Palmore's warning in the *Cullinan* case:

> "The word 'shocking' is well said. It is inexcusable. I rest my case on the proposition stated long ago by

> one of the greatest human beings of all time: 'It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals.' First Annual Message by Abraham Lincoln, December 3, 1861, in 'The State of the Union Messages of the President, 1790-1966," Vol. II, p. 1060 (ed. by F. T. Israel, 1966)." 418 S. W. 2d at 411-12.

The question is not whether municipal corporations think they can afford to pay their tort liabilities. The question is whether the legal system in a just society can afford to permit them to do otherwise.

OPINION RENDERED: June 7, 1985; 3:00 p.m.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 84-CA-2171-MR

BRENDA SIMPSON, ROBERT T. SIMPSON, RUDOLPH V. ADAMS, EVA AMMON, ALMA BAGBY, FRED BLAINE, ROBERT & CHARLSIE BOOKER, LARRY BREWER, JOSEPH L. & CONSTANCE M. BROCK, GEORGE BURNEY, THOMAS L. & CORDELIA BURTON, LILLIE CHANDLER, WALTER R. COSBY, SR., IRENE & NICKIE CROSBY, JOYCE DANIELS, LORETTA L. DAVIS, MONA JOYCE FREEMAN, VERNON & RUBY GIBSON, MR. AND MRS. FRED S. HAMPTON, Et Al. - - - - - - *Appellants*

v.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Joseph Eckert, Judge
Civil Action Nos. 83CI-04865, 83CI-03403,
83CI-05694, 83CI-90127, 83CI-07974,
83CI-09870, 83CI-05917, 84CI-00281
(Consolidated)

OPINION AND ORDER REVERSING AND REMANDING

BEFORE: COMBS, HOWARD and LESTER, JUDGES.

The appellants filed a motion to reverse the summary judgment granted by the trial court and cited the recent Supreme Court case of *Gas Service Co., Inc.* v. *City of London*, Ky., 687 S. W. 2d 144 (1985).

We think the motion is appropriate because the summary judgment was based upon the affirmative defense of sovereign immunity pled by the appellee. We have read the opinion of the Supreme Court in the above cited case and have heard the oral arguments of counsel and, being familiar with the record and briefs herein, we are unable to discern a distinction between the above cited case and the one at bar. Therefore, we are of the opinion that the limitation on sovereign immunity espoused in *Gas Service Co., Inc.* v. *City of London, supra,* applies here and that the summary judgment entered by the trial court was and is clearly erroneous.

The motion to reverse is granted and, therefore, the case is reversed and remanded to the trial court for trial upon the merits.

(s) Harris S. Howard
Judge, Court of Appeals

ENTERED: June 7, 1985

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JEFFERSON CIRCUIT COURT

FIRST DIVISION

Nos. 83CI-04865, 83CI-03403, 83CI-05694, 83CI-90127, 83CI-07974, 83CI-09870, 83CI-05917, 84CI-00281 (Consolidated)

BRENDA SIMPSON, ET AL. - - - - *Plaintiffs*

v.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT - - - *Defendant*

PARTIAL SUMMARY JUDGMENT

Motion having been made by the defendant, Louisville and Jefferson County Metropolitan Sewer District, and the Court having reveiwed the briefs filed by counsel for all parties, considered the authorities cited therein, and after due deliberation having found that there is no genuine issue of material fact pertaining to the status of the Louisville and Jefferson County Metropolitan Sewer District as a governmental agency and its right of governmental immunity, and the Court having concluded that the Louisville and Jefferson County Metropolitan Sewer District, its agents, servants, and employees, are entitled to judgment as a matter of law, and the Court now being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that all claims of all plaintiffs in all actions filed herein, consolidated herewith, or transferred for adjudication herewith, against the Louisville and Jefferson County Metropolitan Sewer District, its agents, servants, and employees, are dismissed with prejudice including all plaintiffs in each of the following civil actions:

1. *Morton S. Bottorff, et al.* v. *Louisville and Jefferson County Metropolitan Sewer District*, Civil Action No. 83CI-03403.
2. *Brenda Simpson, et al.* v. *Louisville and Jefferson County Metropolitan Sewer District*, Civil Action No. 83CI-04865.
3. *Christopher Adkins, et al.* v. *MSD*, Civil Action No. 83CI-05917.
4. *General Drivers Warehousemen and Helpers* v. *Louisville and Jefferson County Metropolitan Sewer District*, Civil Action No. 83CI-05694.
5. *Mildred Butler, et al.* v. *Louisville and Jefferson County Metropolitan Sewer District, et al.*, Civil Action No. 83CI-90127.
6. *Housing Authority of Louisville* v. *Louisville and Jefferson County Metropolitan Sewer District*, Civil Action No. 83CI-07974.
7. *Zelpha Warren* v. *MSD*, Civil Action No. 84CI-00231.
8. *John Thurmond, et al.* v. *Louisville and Jefferson County Metropolitan Sewer District*, Civil Action No. 83CI-09870.
9. *Virginia Baines, et al. (Intervening Plaintiffs)* v. *Louisville and Jefferson County Metropolitan Sewer District*, Civil Action No. 83CI-04865.
10. *David Atchley and Gwen Atchley (Intervening Plaintiffs)* v. *Louisville and Jefferson County Metropolitan Sewer District*, Civil Action No. 83CI-04865.
11. *First Charter Insurance Company and B. F. Goodrich Company (Intervening Plaintiffs)* v. *Louisville and Jefferson County Metropolitan Sewer District and PCR Engineering, Inc. (formerly d/b/a PRC Consoer Townsend & Associates)*, Civil Action No. 83CI-04865.

IT IS HEREBY ORDERED AND ADJUDGED that this judgment dismissing with prejudice the claims of Brenda Simpson,

et al., as class representatives, in civil action no. 83CI-04865, shall be prejudicial to each member of the class designated herein, said class including:

> All entities, including individuals, partnerships, corporations, agencies and institutions, who or which, on or about May 1, 1983, sustained economic harm as a result of surface or sewer water backup to real or personal property that was then located within the southwestern outfall drainage area at or below an elevation of 450 feet above sea level.

IT IS HEREBY ORDERED AND ADJUDGED that the judgment does not pertain to the claims of any of the plaintiffs referred to in this judgment that have been alleged or may be alleged against PRC Engineering, Inc. (formerly d/b/a PRC Consoer Townsend & Associates), all such claims are specifically reserved, and this action shall remain on this Court's docket for further appropriate proceedings and orders pertaining to PRC Engineering, Inc.

IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs pay the defendant's, Louisville and Jefferson County Metropolitan Sewer District, costs herein expended.

This is a final and appealable order, there being no just cause for delay.

(s) Joseph H. Eckert
Judge, Jefferson Circuit Court

Date: 6-19-84

Tendered By:

BARNETT & ALAGIA

By (s) Richard M. Trautwein
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SUPREME COURT OF KENTUCKY

85-SC-688-DG

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT - - - *Movant*

v.

BRENDA SIMPSON, Et Al. - - - - *Respondents*

On Review from the Court of Appeals
84-CA-2171-MR
(Jefferson Circuit Court Nos. 83-CI-04865, 83-CI-05694, 83-CI-07974, 83-CI-05917, 83-CI-03403, 83-CI-90127, 83-CI-09870 and 84-CI-00281)

ORDER DENYING PETITION FOR REHEARING

Respondents petition for rehearing is denied.

Stephens, C.J., and Gant, Stephenson, Vance and Wintersheimer, JJ., concur.

ENTERED July 2, 1987.

(s) Robert F. Stephens
Chief Justice

JEFFERSON CIRCUIT COURT

FIRST DIVISION

Nos. 83CI-04865, 83CI-03403, 83CI-05694, 83CI-90127 (Consolidated)

BRENDA SIMPSON, Et Al. - - - - - *Plaintiffs*

v.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, Et Al. - - - - *Defendants*

MEMORANDUM IN OPPOSITION TO MOTION OF DEFENDANT, MSD, TO DISMISS AND IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL PRODUCTION

INTRODUCTION

This memorandum serves three purposes. First, it is in opposition to defendant's *Motion to Dismiss*. Second, it is in support of Plaintiffs' argument that further discovery is relevant to the issues of sovereign immunity and reverse condemnation. Third, it will address MSD's objection, based on attorney-client privilege, to Plaintiffs' discovery requests.

PROCEDURAL HISTORY

Defendant, Louisville and Jefferson County Metropolitan Sewer District ("MSD"), has served its Motion to Dismiss based on the facts as set out in Plaintiffs' Consolidated Complaint. The sole basis for MSD's Motion was and is sovereign immunity. Plaintiffs' response to MSD's

Motion was that it was premature because of the lack of a factual background.

Indeed, MSD presently has only one fact on which to rely in its argument that no "special relation" exists between the Plaintiffs and MSD to justify an individualized duty. MSD naively argues that, because "a lot" of people were flooded on May 1, 1983, MSD affected the public as a whole versus the Plaintiffs as individuals. Pat Holland's and David Presnell's depositions show that 1,989 persons are members in the class of flood victims. There are approximately 676,400 persons in Louisville and Jefferson County. MSD's flood therefore affected .29% of the population. Should the courts of Kentucky adopt a rule that, whenever .29% of the population of a city is affected, the sovereign has a license to do as it pleases? Any reasonable percentage of a city's population can be separated out from the public as a whole and subjected to a special injustice. .29% in some cities could amount to only one person. Conversely, one person can offer such a great threat to the financial integrity of a small town (a prime consideration in *Louisville Seed*) that a denial of liability against the sovereign would be justified. The quantitative factor is only one consideration. Certainly, qualitative factors must be relevant.

REVERSE CONDEMNATION

II. For Over 100 Years Kentucky Law Has Imposed on the Sovereign, Like MSD, a Duty to Design Its Sewers So That Reasonably Anticipated Rainfall Will be Carried Away From the Neighborhood to be Drained. MSD Breached This Constitutionally Mandated Duty and Must Compensate the Plaintiffs for the Damage to Their Property.

1. MSD Is Liable to the Plaintiffs for the Negligent Design of Its Sewers.

As was the rule at the height of the era of sovereign immunity, and as is still the rule after *Haney* and *Louisville Seed,* the Plaintiffs may recover for MSD's negligent design of sewers.

In *City of Louisville* v. *Cope,* 296 Ky. 207, 176 S. W. 2d 390 (1943), the plaintiff sued the City of Louisville for damages, "caused by backwater from the sewer accumulating in the basement and garage of the residence through the drain basins and pumping facilities." 176 S. W. 2d at 391. It is redundant to say that these facts are identical to the case-at-bar. In *Cope,* the evidence showed that the sewer as constructed by the City of Louisville was too narrow, in spots, to accommodate the flow of sewage during heavy rainfalls. (In the case-at-bar, the closed sluice gates made the sewers inadequate to drain foreseeable rainfall.) On these facts, the *Cope* Court did not hesitate to rule for the plaintiff, as follows:

> The right to have the case submitted rests upon the law prevailing in this jurisdiction (though not uniformly recognized, 38 Am. Jur., Mun. Corp. Sec. 639) that where a city undertakes to establish drainage and sewerage systems, it is under the duty to do so by a plan sufficient in character and size to carry off ordinary rainfalls that might reasonably be expected to occur in the area and also to provide for the growth in the population of the city and increase in use that may naturally and reasonably be expected. If the system thus inaugurated proves to be inadequate it must be changed to keep pace with the increasing demands upon the resources of the artificial channels it has established.

176 S. W. 2d at 391.

The city, in *Cope,* did not assert the defense of sovereign immunity, mainly because that issue had long ago been

resolved against the city in *City of Louisville* v. *Norris,* 111 Ky. 903, 64 S. W. 958 (1901). In *Norris,* The City of Louisville was held liable for negligently designing its sewers, *despite the City's assertion of sovereign immunity. Id.*

In *Campbell* v. *City of Vanceburg,* 30 KLR 1340, 101 S. W. 343 (1907), the city, again, negligently designed its sewers causing a flood of residential property. The Court held:

> *A city is not liable for its failure to make new improvements or alter or reconstruct old ones. It may leave things just as it found them.* In Dillon Municipal Corporations, § 1041, the rule is thus stated: "It is clear that there is no liability on the part of a municipal corporation for not exercising the discretionary or legislative power it may possess to improve streets, and as part of such improvement to construct gutters or provide other means of drainage for surface waters so as to prevent them from flowing upon the adjoining lots." *But when a city undertakes to make improvements, or to alter or reconstruct old ones, it then assumes the duty of completing and keeping them in such condition that the property of the citizen will not be injured thereby.*

101 S. W. at 345.

The Plaintiffs' right to recovery in the context of negligent construction of sewers appears sacred in Kentucky decisions. Less than one year before *Louisville Seed* was decided, in *Seaman* v. *Castellini,* Ky., 415 S.W. 2d 612 (1967), the highest Court of Kentucky affirmed this right against the City of Florence, where the plaintiffs recovered for negligent design of the sewers by the city!!

Moreover, *Falender* v. *City of Louisville,* Ky., 448 S.W. 2d 367 (1969) made it clear that *Louisville Seed* was not

meant to disturb tort duties already deeply ingrained in Kentucky law as to the negligence of municipal corporations. It would be ironic to say that the Plaintiffs herein have *less* rights against MSD because of the abolition of sovereign immunity in Kentucky.*

2. Liability Imposed for the Negligent Construction of Sewers is an Outgrowth of Sections 13 and 242 of the Kentucky Constitution, Under Which MSD Must Compensate the Plaintiffs.

One wonders how a clear tort duty concerning the design and maintenance of sewer systems evolved even in an era where the most oppressive aspects of sovereign immunity prevailed. Yet, an extensive survey of the cases makes it clear that, what otherwise appears to be a tort duty, has constitutional foundations. In the instant case, Plaintiffs' right to drainage was a substantial property right unconstitutionally impaired by the construction of MSD's sluice gates as a public project. The resulting reduction of value in the Plaintiffs' property is obvious. MSD's construction of the sluice gates resulting in such unconstitutional taking is equivalent to a taking, by MSD, of the "soil itself."

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*Every case in Kentucky, in the context of a storm water sewer backup or negligent management of public waterways, implicitly or explicity rejects sovereign immunity as a defense. *See, e.g., Corwin* v. *Young*, 29 KLR 251, 92 S. W. 930 (1906); *City of Louisville* v. *Knighton*, 30 KLR 1037, 100 S. W. 228 (1907); *Town of Central Covington* v. *Beiser*, 122 Ky. 715, 92 S. W. 973 (1906); *City of Louisville* v. *O'Malley*, 21 KLR 873, 53 S. W. 287 (1899); *Rust* v. *City of Newport*, 284 Ky. 567, 145 S. W. 2d 511 (1940); *Talbert* v. *City of Winchester*, 277 Ky. 164, 125 S. W. 2d 1002 (1939); *City of Harrodsburg* v. *Yeast*, Ky., 247 S. W. 2d 383 (1952); *City of Covington* v. *McKinney*, 263 Ky. 131, 92 S. W. 2d 1 (1936); *City of Irvine* v. *Gallagher*, 230 Ky. 347, 19 S. W. 2d 968 (1929); *Louisville & Jefferson County Metropolitan Sewer District* v. *Kirk*, Ky., 390 S. W. 2d 182 (1965).

Superior Coal and Builders Supply Co. v. *Board of Education, infra.*

Under the Kentucky Constitution, owners of property taken, injured or destroyed for a public purpose must receive just compensation for their loss. Ky. Const. §§ 13, 242. In the cases cited above, the Plaintiffs' properties, were taken injured or destroyed because of the negligent design of sewers. In the context of an unconstitutional taking, the sovereign's immunity from tort is waived. *Layman* v. *Beeler,* 113 Ky. 221, 67 S. W. 995, 996 (1902). By definition, the Plaintiffs suffer a special injury beyond that suffered by the public as a whole. *City of Henderson* v. *McClain,* 102 Ky. 402, 407, 43 S. W. 995 (1902). There is no question that the sovereign has a duty leading to liability.

> Where a city takes, injures or destroys private property for a public purpose without making just compensation therefor, the fact that the city may be entitled to plead sovereign immunity as a defense to an action in tort is wholly immaterial. *See O'Gara* v. *City of Dayton, supra.* Indeed there need be no showing of negligence at all, and *the city may even be liable for the sections of independent contractors who accurately followed project plans and specifications. City of Covington* v. *Parsons, supra; see Blair* v. *City of Pikeville, supra; City of Cumberland* v. *Central Baptist Church, supra.*

Wireman v. *City of Greenup,* Ky. App., 582 S. W. 2d 48, 50 (1979).

Commonwealth v. *Kelley,* 314 Ky. 581, 236 S. W. 2d 695 (1951) developed this principle further. *Kelley* alleged that the State Highway Department negligently managed a drainage culvert causing it be blocked thereby flooding the plaintiffs' residents. This *Kelley* Court held:

> [The state argues] that to show a "taking" of property, the petition must state facts from which the court may infer a total ouster from possession, or at least a substantial deprivation of all beneficial use of the land affected. *It seems to us, however, that an interference with the legally protected use to which land has been dedicated, which destroys that use or places a substantial and additional burden on the landowner to maintain that use, is a "taking" of his property.*

These cases seem to require three basic elements for recovery:

(1) An interference with a substantial property right;
(2) The interference must be incidental to a public project; and
(3) The interference causes a reduction in property value.

See, e.g., Jefferson County v. *Bischoff*, 238 Ky. 176, 37 S.W. 2d 24 (1931); *City of Ashland* v. *Queen*, 254 Ky. 329, 71 S.W. 2d 650 (1934) (where the right to privacy and enjoyment to land was disturbed). There is no requirement that the interference be permanent. *Mercer County* v. *Ballinger*, 238 Ky. 120, 36 S. W. 2d 856 (1931) (where a temporary flooding of property was sufficient).

Superior Coal and Builders' Supply Co. v. *Board of Education*, 260 Ky. 84, 83 S. W. 2d 875 (1935), recognizes Plaintiffs' right to drainage as a substantial property right in land equivalent to the "soil itself." In *Superior Coal*, the sovereign changed the grade and topography of the real estate adjacent to the plaintiff's property and substituted, "for natural water course thereon, a drain of such insufficient and small dimensions as to cause water to accumulate in large quantities during heavy rainfalls, ..." 83 S. W. 2d at 875. The *Superior Coal* Court found

that the plaintiff had a constitutionally protected right to natural drainage, as follows:

> *The natural drainage of the plaintiff's land by this natural watercourse is as much a part of the plaintiff's property as the soil itself,* and if by what the defendant has done to this watercourse this drainage has been so affected as to depreciate the market value of the plaintiff's property, then to that extent the defendant has taken the plaintiff's property, just as effectually as if it had seized a portion of the surface itself.

83 S. W. 2d at 876.

Hence, when the sovereign alters a dedicated course of drainage, it has a continuing duty to provide the affected citizens drainage equal to or greater than that which they had enjoyed before the alterations occurred. As explored in the cases cited above, the sovereign is not liable for *failing* to act to protect its citizens from naturally occurring floods, *i.e.* the Ohio River in *Louisville Seed. See, e.g., Campbell* v. *City of Vanceburg, supra.* But when the sovereign *does* act, it cannot *increase* the risk of flooding beyond that which was expected through established watercourses. *Id.* Adequate drainage must be maintained by the sovereign to replace the common law drainage; otherwise, an unconstitutional taking of that right occurs.

This is consistent with *Louisville Seed.* It is a matter of judicial notice that MSD forces persons, on an individual basis, to connect to its sewers as it expands its sewer systems. MSD should provide these individuals with drainage at least equivalent to that enjoyed before the public sewer projects altered the natural drainage.

Moreover, the public at large benefits from the sluice gate as a public project in enjoying a cleaner Ohio River through more effective waste water treatment. The Plain-

tiffs paid dearly for a cleaner river, however, by suffering basements filled with sewage and storm water. Four-fifths of the homes in SODA were afforded the opportunity to literally dump their sewage on the Plaintiffs, thanks to MSD. An unconstitutional taking therefore occurred on May 1, 1983 equivalent to the taking of the "soil itself."*

* * * * * * *

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*For cases discussing reverse condemnation and the fact that sovereign immunity is no defense to an unconstitutional taking, see generally, *O'Gara* v. *City of Dayton*, 175 Ky. 395, 194 S. W. 380 (1917); *Commonwealth, Department of Highways* v. *Robbins*, Ky., 421 S. W. 2d 820 (1967); *Ewing* v. *City of Louisville*, 140 Ky. 726, 131 S. W. 1016 (1910); *Commonwealth* v. *Watson*, Ky., 446 S. W. 2d 295 (1969); *Commonwealth* v. *Cochrane*, Ky., 397 S. W. 2d 155 (1965); *Webster County* v. *Lutz*, 234 Ky. 618, 28 S. W. 2d 966 (1930); *City of Cumberland* v. *Central Baptist Church of Cumberland*, 305 Ky. 283, 203 S. W. 2d 57 (1947); *Dept. of Highways* v. *Corey*, Ky., 247 S. W. 2d 389 (1952); *Grow* v. *Patton*, Ky., 313 S. W. 2d 572 (1957); *Commonwealth* v. *Widner*, Ky., 388 S. W. 2d 583 (1965); *City of Newport* v. *Rosing*, Ky., 319 S. W. 2d 852 (1958); *Kentucky Game & Fish Commission* v. *Burnette*, 290 Ky. 786, 163 S. W. 2d 50 (1942); *Lehman* v. *Williams*, 301 Ky. 729, 193 S. W. 2d 161 (1946); *Jefferson County* v. *Bischoff*, 238 Ky., 176, 37 S. W. 2d 24 (1931).

COURT OF APPEALS OF KENTUCKY

File No. 84-CA-2171-MR

BRENDA SIMPSON, et al. - - - - - *Appellants*

v.

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT, - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Joseph Eckert, Judge
Civil Action No. 83CI-04865, 83CI-03403,
83CI-05694, 83CI-90127, 83CI-07974,
83CI-09870, 83CI-05917, 84CI-00281
(Consolidated)

BRIEF FOR APPELLANTS, BRENDA SIMPSON, et al.

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CERTIFICATE

I hereby certify that a copy of this Brief for Appellants, Brenda Simpson, et al. was served by mail upon Judge Joseph Eckert, Jefferson Circuit Court, 6th & Jefferson, Louisville, Kentucky 40202, and Richard M. Trautwein, Ronald E. Johnson, E. Paul Herrington, Peter F. Ervin, The Fifth Avenue Building, 444 South Fifth Street, Louisville, Kentucky 40202, Counsel for Appellee, this 5th day of October, 1984 and that the Record on Appeal was returned to the Clerk of the Jefferson Circuit Court before this brief was filed.

(s) John T. Ballantine
Lead Counsel for Appellants

* * * * * * * *

II. Reverse Condemnation—For Over 100 Years Kentucky Law has Imposed on the Sovereign, Like MSD, a Duty to Design Its Sewers to Drain Reasonably Anticipated Rainfall and Not Impair the Water Runoff Capabilities of the Properties Served by the Sewers. Louisville Seed Was Not Meant to Abrogate Duties so Deeply Entrenched in Kentucky Law.

A. MSD is Liable to the Appelants for the Negligent Design of Its Sewers.

In *City of Louisville* v. *Cope,* 296 Ky. 207, 176 S. W. 2d 930 (1943), the plaintiff sued the City of Louisville for damages, "caused by backwater from the sewer accumulating in the basement and garage of the residence through the drain basins and pumping facilities," *Id.* at 391. In *Cope,* the evidence showed that the sewer as constructed by the City of Louisville was too narrow, in spots, to accommodate the flow of sewage during heavy rainfalls. (In the case-at-bar, the closed sluice gates made the sewers inadequate to drain foreseeable rainfall). On these facts, the *Cope* Court did not hesitate to rule for the plaintiff. *Id.* at 391. *See also City of Louisville* v. *Norris,* 111 Ky.

903, 64 S. W. 958 (1901) (Sovereign immunity not a defense for a city that negligently designs its sewers).

The rule in *Cope* had found one of its earliest expressions as follows:

> *A city is not liable for its failure to make new improvements or alter or reconstruct old ones. It may leave things just as it found them.* In Dillon Municipal Corporations, § 1041, the rule is thus stated: "It is clear that there is no liability on the part of a municipal corporation for not exercising the discretionary or legislative power it may possess to improve streets, and as part of such improvement to construct gutters or provide other means of drainage for surface waters so as to prevent them from flowing upon the adjoining lots." *But when a city undertakes to make improvements, or to alter or reconstruct old ones, it then assumes the duty of completing and keeping them in such condition that the property if the citizen will not be injured thereby.*

Campbell v. *City of Vanceburg,* 30 KLR 1340, 101 S. W. 343, 345 (1907).*

**Every* case in Kentucky, in the context of a storm water sewer backup or negligent management of public waterways, implicitly or explicitly rejects sovereign immunity as a defense. *See, e.g., Louisville & Jefferson County Metropolitan Sewer District* v. *Kirk,* Ky., 390 S. W. 2d 182 (1965); *City of Harrodsburg* v. *Yeast,* Ky., 247 S. W. 2d 383 (1952); *Rust* v. *City of Newport,* 284 Ky. 567, 145 S. W. 2d 511 (1940); *Talbert* v. *City of Winchester,* 277 Ky. 164, 125 S. W. 2d 1002 (1939); *City of Covington* v. *McKinney,* 263 Ky. 131, 92 S. W. 2d 1 (1936); *City of Irvine* v. *Gallagher* 230 Ky. 347, 19 S. W. 2d 968 (1929); *City of Louisville* v. *Knighton,* 30 KLR 1037, 100 S. W. 228 (1907); *Corwin* v. *Young,* 29 KLR 251, 92 S. W. 930 (1906); *Town of Central Covington* v. *Beiser,* 122 Ky. 715, 92 S. W. 973 (1906); *City of Louisville* v. *O'Malley,* 21 KLR 873, 53 S. W. 287 (1899).

The appellants' right to recovery in the context of negligent construction of sewers is sacred in Kentucky. Less than one year before *Louisville Seed* was decided, the highest Court of Kentucky again affirmed this right. *Seaman* v. *Castellini,* Ky., 415 S. W. 2d 612 (1967).

Moreover, *Falender* v. *City of Louisville,* Ky., 448 S. W. 2d 367 (1969) made it clear that *Louisville Seed* was *not* meant to disturb tor duties already deeply ingrained in Kentucky law as to the negligence of municipal corporations.

MSD has only one fact on which to rely in its argument that no "special relation" exists between the appellants and MSD to justify an individualized tort duty. MSD naively argues that, because "a lot" of people were flooded on May 1, 1983, MSD affected the public as a whole versus the appellants as individuals. Pat Holland's and David Presnell's depositions show that 1,989 persons are members in the plaintiff class of flood victims. There are approximately 676,400 persons in Louisville and Jefferson County. MSD's flood, therefore, affected less than one third of one percent (.29%) of the population. The courts of Kentucky should not adopt a rule that, whenever less than one third of one percent of the population of a city is affected, the sovereign has a license to do as it pleases! The quantitative factor is only one consideration. Certainly, qualitative factors must also be relevant.

B. Liability Imposed for the Negligent Design of Sewers Is an Outgrowth of Sections 13 and 242 of the Kentucky Constitution, under Which MSD Must Compensate the Appellants.

MSD's construction of the sluice gates resulted in the impairment of appellants' drainage rights and was equivalent to an unconstitutional taking, by MSD, of the "soil

itself." *Superior Coal and Builders Supply Co.* v. *Board of Education,* 260 Ky. 84, 83 S. W. 2d 875 (1935). Under the Kentucky Constitution, MSD must, "make just compensation for property taken, injured or destroyed," for a public purpose. Ky. Const. § 242. There is no question that the doctrine of sovereign immunity has no application in such a context. *Wireman* v. *City of Greenup,* Ky. App., 582 S. W. 2d 48, 50 (1979).

Three basic elements for recovery under Ky. Const. § 242 are required:

(1) An interference with substantial property rights;
(2) An interference incidental to a public project; and
(3) An interference causing a reduction in property value.

See, e.g., Jefferson County v. *Bischoff,* 238 Ky. 176, 37 S. W. 2d 24 (1931); *City of Ashland* v. *Queen,* 254 Ky. 329, 71 S. W. 2d 650 (1934) (where the right to privacy and enjoyment to land was disturbed). The last two elements listed are obviously present in the instant case: the construction of the sluice gates was incidental to a public project and resulted in the property of the appellants being flooded and reduced in value.

The interference by MSD of appellants' drainage rights clearly satisfies the first element listed above. *Superior Coal and Builders' Supply Co.* v. *Board of Education,* 260 Ky. 84, 83 S. W. 2d 875 (1935), recognizes this right to drainage as a constitutionally protected property right in land.

> *The natural drainage of the plaintiff's land by this natural watercourse is as much a part of the plaintiff's property as the soil itelf,* and if by what the defendant has done to this watercourse this drainage has been so affected as to depreciate the market value of the

> plaintiff's property, then to that extent the defendant has taken the plaintiff's property, just as effectually as if *it had seized a portion of the surface itself.*

Id. at 876.

When the sovereign alters a dedicated course of drainage, it has a continuing duty to provide the affected citizens drainage equal to or greater than that which they had enjoyed before the alterations occurred. The sovereign is not liable for *failing* to act to protect its citizens from naturally occuring floods, *i.e.* the Ohio River in *Louisville Seed. See, e.g., Campbell* v. *City of Vanceburg, supra.* But when the sovereign *does* act, it cannot *increase* the risk of flooding beyond that which was expected through established watercourses. *Id.**

MSD's sluice gates had *nothing* to do with protecting the appellants from flood. MSD constructed the sluice gates to assure more *effective* wastewater treatment by assuring that the Ohio River at flood stage would not flood MSD's

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*For cases discussing reverse condemnation and the fact that sovereign immunity is no defense to an unconstitutional taking, see generally, *Commonwealth* v. *Watson,* Ky., 446 S. W. 2d 295 (1969); *Commonwealth, Department of Highways* v. *Robbins,* Ky., 421 S. W. 2d 820 (1967), *Commonwealth* v. *Cochrane,* Ky., 397 S. W. 2d 155 (1965). *Comonwealth* v. *Widner,* Ky., 388 S. W. 2d 583 (1965); *City of Newport* v. *Rosing, Ky.,* 319 S. W. 2d 852 (1958); *Grow* v. *Patton,* Ky., 313 S. W. 2d 572 (1957); *Dept. of Highways* v. *Corey,* Ky., 247 S. W. 2d 389 (1952); *City of Cumberland* v. *Central Baptist Church of Cumberland,* 305 Ky. 283, 203 S. W. 2d 57 (1947); *Lehman* v. *Williams,* 301 Ky. 729, 193 S. W. 2d 161 (1946); *Kentucky Game & Fish Commission* v. *Burnette,* 290 Ky. 786, 163 S. W. 2d 50 (1942); *Jefferson County* v. *Bischoff,* 238 Ky. 176, 37 S. W. 2d 24 (1931); *Webster County* v. *Lutz,* 234 Ky. 618, 28 S. W. 2d 966 (1930); *O'Gara* v. *City of Dayton,* 175 Ky. 395, 194 S. W. 380 (1917); *Ewing* v. *City of Louisville,* 140 Ky. 726, 131 S. W. 1016 (1910).

wastewater treatment facilities. Perhaps the public as a whole enjoyed a cleaner Ohio River because of the addition of the sluice gates in 1975. But the public paid for this privilege only through a slight increase in their sewage fees. The appellants, on the other hand, paid with sewage-filled basements and almost all of their worldly possessions.

In the most real sense, MSD took appellants' property when the sluice gates were constructed as a public project. MSD took appellants' property in an attempt to protect MSD's own property!!

III. Special Knowledge —MSD Cannot, With Impunity, Have Actual Knowledge of the Dangerous Condition It Created with Its Sluice Gates, and Yet Fail to Protect the Appellants Who Were Foreseeably Affected by this Danger. These Facts Impose Liability, on MSD, Under Louisville Seed.

In Kentucky and other jurisdictions, the sovereign is held liable where it has *special knowledge* of a dangerous condition with a foreseeable risk to a class of citizens, yet fails or is negligent in abating the risk when it is in a unique position to do so. The forceful and simple equity of this rule for recovery against MSD is: MSD cannot sit back and cause its customers to be injured, while it has the knowledge, expertise and facilities to avoid the harm.

This rule of recovery is found in *Falender* v. *City of Louisville, supra. See also City of Louisville* v. *Habeeb,* Ky., 556 S. W. 2d 665 (1977); *Runkel* v. *City of New York,* 282 A.D. 1973, 123 N.Y.S. 2d 485 (1953): *Smullen* v. *City of New York,* 268 N. E. 2d 763 (N.Y. 1971); *Campbell* v. *City of Bellevue,* 85 Wash. 2d. 1, 530 P. 2d 235, 239 (1974). The *Falender* plaintiff sued the City of negligence in failing to keep its streets reasonably safe for travel. The city apparently had notice of a defect which it failed to

correct. In ruling for the plaintiff, the *Falender* Court reasoned that the duty to keep streets reasonably safe had long been recognized in the Commonwealth. *Louisville Seed* did not change this duty. *Id.* at 370. *Cf. City of Louisville* v. *Cope, supra* with *Central City* v. *Snodgrass,* 234 Ky. 396, 28 S. W. 2d 467 (1930).

Kentucky courts have readily applied this special knowledge rule to public utilities performing governmental functions. Imposing a similar duty on MSD in the case-at-bar would be consistent with the requirements of *Louisville Seed* that the sovereign should be, "liable in those situations where a private person [e.g. utility companies] would be liable." *City of Louisville* v. *Louisville Seed Co., supra* at 643.

For instance, *Haddad* v. *Louisville Gas & Electric Company,* Ky., 449 S. W. 2d 916 (1970) held that the gas company was under a duty to disconnect the gas furnace of a residential property owner once the gas company had actual knowledge that the furnace was emitting toxic carbon monoxide fumes. *Id.* at 918. *See also Kentucky Utilities Co.* v. *Sutton's Adm'r,* 237 Ky. 772, 36 S. W. 2d 380 (1931); *Current* v. *Columbia Gas of Kentucky, Inc.,* Ky., 383 S. W. 2d 139 (1964); *Smith's Adm'x* v. *Middlesboro Electric Co.,* 164 Ky. 46, 174 S. W. 773 (1915).

Under the "special knowledge" rule, MSD should be required to stand trial because the first flood, on December 6, 1977, occured for reasons almost identical to the May 1, 1983 flood!! MSD's insurance company made recommendations as to changes to prevent future flooding. Yet, "most of those recommendations were ignored." *Mayor's Report.*

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SUPREME COURT OF KENTUCKY

85-SC-688-D
(84-CA-2171-MR)

LOUISVILLE and JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT - - - - - - - *Appellant*

v.

BRENDA SIMPSON, Et Al. - - - - *Appellees*

Jefferson Circuit Court Nos.
83-CI-04865, 83-CI-03403, 83-CI-05694,
83-CI-90127, 83-CI-07974, 83-CI-09870,
83-CI-05917 and 84-CI-00281
DISCRETIONARY REVIEW OF A DECISION OF
THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR APPELLEES, BRENDA SIMPSON, Et Al.

John T. Ballantine
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CERTIFICATE

I hereby certify that, in accordance with CR 5.03 and CR 76.12(6), a copy of this Brief for Appellees was served by mail on January 13, 1986, upon the persons named on the next page hereof and further certify that the record on appeal was not withdrawn by these Appellees or their counsel.

(s) John T. Ballantine

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II. Reverse Condemnation—MSD Claims It Is a "Sovereign"—But for Over 100 Years Kentucky Law Has Imposed on any "Sovereign" a Constitutionally Mandated Duty to Design Its Sewers to Drain Reasonably Anticipated Rainfall and Not Impair the Water Runoff Capabilities. Sovereign Immunity Under Kentucky Constitution §231 Is No Defense Against Appellees Claim of Reverse Condemnation.

There is no question that *sovereign immunity has no* application in the context of reverse condemnation. *Wireman* v. *City of Greenup,* Ky. App., 582 S. W. 2d 48, 50 (1979).

Hence, even if MSD is correct in its theory that it is a constitutionally immune under §231 (a point vehemently denied by appellees above), MSD is still liable to appellees under reverse condemnation, as demonstrated below.

Most important, MSD has cited to this Court *NO*—"count 'em"—*NO* case that holds that MSD is *not* liable under reverse condemnation in this action!! In fact, MSD only referred to reverse condemnation at page two of its Brief and for the remaining 39 pages of its Brief NEVER even used the phrase!

A. MSD Is Liable to the Appellees for the Negligent Design of its Sewers.

In *City of Louisville* v. *Cope*, 296 Ky. 207, 176 S. W. 2d 930 (1943), the plaintiff sued the City of Louisville for damages, "caused by backwater from the sewer accumulating in the basement and garage of the residence through the drain basins and pumping facilities." *Id.* at 391. In *Cope*, the evidence showed that the sewer as constructed by the City of Louisville was inadequate, in spots, to accommodate the flow of sewage during heavy rainfall. (In the case-at-bar, the closed sluice gates made the sewers inadequate to drain foreseeable rainfall.) On these facts, the *Cope* Court did not hesitate to rule for the plaintiff. *Id.* at 391. *See also City of Louisville* v. *Norris*, 111 Ky. 903, 64 S. W. 958 (1901) (*Sovereign immunity not a defense for a city that negligently designs its sewers.*)

The rule in *Cope* had found one of its earliest expressions, as follows:

> *A city is not liable for its failure to make new improvements or alter or reconstruct old ones. It may leave things just as it found them.* In Dillon Municipal Corporations, § 1041, the rule is thus stated: "It is clear that there is no liability on the part of a municipal corporation for not exercising the discretionary or legislative power it may possess to improve streets, and as part of such improvement to construct gutters or provide other means of drainage for surface waters so as to prevent them from flowing upon the adjoining lots." *But when a city undertakes to make improvements, or to alter or reconstruct old ones, it then assumes the duty of completing and keeping them in such condition that the property of the citizen will not be injured thereby.*

Campbell v. *City of Vanceburg*, 30 KLR 1340, 101 S. W. 343, 345 (1907).*

The appellees' right to recovery in the context of negligent construction of sewers appears sacred in Kentucky. *See, e.g., Seaman* v. *Castellini*, Ky., 415 S. W. 2d 612 (1967).

B. Liability Imposed for the Negligent Design of Sewers Is an Outgrowth of Sections 13 and 242 of the Kentucky Constitution, Under Which MSD Must Compensate the Appellees.

MSD's construction of the sluice gates resulted in the impairment of appellees' drainage rights and was equivalent to an unconstitutional taking, by MSD, of the "soil itself." *Superior Coal and Builders Supply Co.* v. *Board of Education*, 260 Ky. 84, 83 S. W. 2d 875 (1935). Under the Kentucky Constitution, MSD must, "make just compensation for property taken, injured or destroyed," for a public purpose. Ky. Const. § 242.

Three basic elements for recovery under Ky. Const. § 242 are required:

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*Every case in Kentucky, in the context of a storm water sewer backup or negligent management of public waterways, implicitly or explicitly rejects sovereign immunity as a defense. *See, e.g., Louisville & Jefferson Countly Metropolitan Sewer District* v. *Kirk*, Ky., 390 S. W. 2d 182 (1965); *City of Harrodsburg* v. *Yeast*, Ky., 247 S. W. 2d 383 (1952); *Rust* v. *City of Newport*, 284 Ky. 567, 145 S. W. 2d 511 (1940); *Talbert* v. *City of Winchester*, 277 Ky. 164, 125 S. W. 2d 1002 (1939); *City of Covington* v. *McKinney*, 263 Ky. 131, 92 S. W. 2d 1 (1936); *City of Irvine* v. *Gallagher*, 230 Ky. 347, 19 S. W. 2d 968 (1929); *City of Louisville* v. *Knighton*, 30 KLR 1037, 100 S. W. 228 (1907); *Corwin* v. *Young*, 29 KLR 251, 92 S. W. 930 (1906); *Town of Central Covington* v. *Beiser*, 122 Ky. 715, 92 S. W. 973 (1906); *City of Louisville* v. *O'Malley*, 21 KRL 873, 53 S. W. 287 (1899).

(1) An interference with substantial property rights;
(2) An interference incidental to a public project; and
(3) An interference causing a reduction in property value.

See, e.g., Jefferson County v. *Bischoff*, 238 Ky. 176, 37 S. W. 2d 24 (1931); *City of Ashland* v. *Queen*, 254 Ky. 329, 71 S. W. 2d 650 (1934) (where the right to privacy and enjoyment to land was disturbed). The last two elements listed are obviously present in the instant case: (2) the construction of the sluice gates was "incidental to a public project" and (3) resulted in the property of the appellees being flooded and "reduced in value."

Also, the interference by MSD of appellees' drainage rights clearly satisfies the first element listed above. *Superior Coal and Builders' Supply Co.* v. *Board of Education*, 260 Ky. 84, 83 S. W. 2d 875 (1935), recognizes this right to drainage as a constitutionally protected property right in land.

> *The natural drainage of the plaintiff's land by this natural watercourse is as much a part of the plaintiff's property as the soil itself*, and if by what the defendant has done to this watercourse this drainage has been so affected as to depreciate the market value of the plaintiff's property, then to that extent the defendant has taken the plaintiff's property, just as effectually as if *it had seized a portion of the surface itself.*

Id. at 876.

When a dedicated course of drainage is altered by a public utility or agency, there is a continuing duty to provide the affected citizens drainage equal to or greater than that which they had enjoyed before the alterations occurred. The utility or agency is not liable for *failing* to act to protect citizens from naturally occurring floods, but

when it *does* act, it cannot *increase* the risk of flooding beyond that which was expected through established watercourses.*

MSD's sluice gates had *nothing* to do with protecting the appellees from flood. MSD constructed the sluice gates to facilitate more *effective* wastewater treatment by assuring that the Ohio River at flood stage would not flood MSD's wastewater treatment plants. In the most real sense, MSD took appellees' property when the sluice gates were constructed as a public project. MSD took appellees property in an attempt to protect MSD's own property!!

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*For cases discussing reverse condemnation and the fact that sovereign immunity is no defense to an unconstitutional taking, see generally, *Commonwealth, Department of Highways*, v. *Watson*, Ky., 446 S. W. 2d 295 (1969); *Commonwealth, Department of Highways* v. *Robbins*, Ky., 421 S. W. 2d 820 (1967), *Commonwealth, Department of Highways*, v. *Cochrane*, Ky., 397 S. W. 2d 155 (1965), *Commonwealth, Department of Highways*, v. *Widner*, Ky., 388 S. W. 2d 583 (1965); *City of Newport* v. *Rosing*, Ky., 319 S. W. 2d 852 (1958); *Commonwealth, Department of Highways* v. *Corey*, Ky., 247 S. W. 2d 389 (1952); *City of Cumberland* v. *Central Baptist Church of Cumberland*, 305 Ky. 283, 203 S. W. 2d 57 (1947); *Lehman* v. *Williams*, 301 Ky. 729, 193 S. W. 2d 161 (1946); *Kentucky Game & Fish Commission* v. *Burnette*, 290 Ky. 786, 163 S. W. 2d 50 (1942); *Jefferson County* v. *Bischoff*, 238 Ky. 176, 37 S. W. 2d 24 (1931); *Webster County* v. *Lutz*, 234 Ky. 618, 28 S. W. 2d 966 (1930); *O'Gara* v. *City of Dayton*, 175 Ky. 395, 194 S. W. 2d 380 (1917); *Ewing* v. *City of Louisville*, 140 Ky. 726, 131 S. W. 1016 (1910).

III. MSD Cannot, With Impunity, Have Actual Knowledge of the Dangerous Condition It Created With Its Sluice Gates, and Yet Fail to Protect the Appellees From Such Danger. The Public Policy Considerations Behind All of Tort Law—Compensation, Deterrence and Fault—Demand That MSD be Liable.

A. MSD Cannot Have Actual Knowledge of a Danger, and Yet Fail to Act for Its Prevention.

In Kentucky and other jurisdictions the sovereign is held liable where it has *special knowledge* of a dangerous condition with a foreseeable risk to a class of citizens, yet fails or is negligent in abating the risk when it is in a unique position to do so. The forceful and simple equity of this rule for recovery against MSD is: MSD cannot sit back and cause its customers to be injured, while it has the knowledge, expertise and facilities to avoid the harm.

* * * * * * *

SUPREME COURT OF KENTUCKY

85-SC-688-D
(84-CA-2171-MR)

LOUISVILLE and JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT - - - - - - - *Appellant*

v.

BRENDA SIMPSON, Et Al. - - - - *Appellees*

Jefferson Circuit Court Nos.
83-CI-04865, 83-CI-03403, 83-CI-05694,
83-CI-90127, 83-CI-07974, 83-CI-09870,
83-CI-05917 and 84-CI-00281
DISCRETIONARY REVIEW OF A DECISION OF
THE COURT OF APPEALS OF KENTUCKY

APPELLEES' PETITION FOR REHEARING

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(502) 582-1601
Counsel for Appellees,
Brenda Simpson, Et Al.

CERTIFICATE

I hereby certify that, in accordance with CR 5.02, 76.12 (5), and 76.32(3)(c), a copy of this Petition for Rehearing was served by mail before filing on May 20, 1987, upon the persons named on the next page hereof and further certify that the record on appeal was not withdrawn by Appellees or their counsel.

(s) Gregory J. Bubalo

* * * * * * *

IV. Even If MSD Is Immune As To Its Torts, It Is NOT Immune For An Unconstitutional Taking of Appellee's Drainage Rights Under The U.S. Constitution As Well As Sections 13 and 242 Of The Kentucky Constitution And These Principles Were Entirely Overlooked By This Court.

No question exists that even constitutionally mandated sovereign immunity is no defense to an action based on reverse condemnation. *Wireman* v. *City of Greenup,* Ky. App., 582 S. W. 2d 48, 50 (1979). If any sovereign in this Commonwealth disturbs or somehow diminishes citizens' drainage rights, such actions are equivalent to an unconstitutional taking of the "soil itself." *Superior Co. and Builders Co.* v. *Board of Education,* 260 Ky. 84, 83 S. W. 2d 875 (1935). Under the Kentucky Constitution, MSD must "make just compensation for property taken, injured or destroyed" for public purpose. *Ky. Const.* § 242. *See also Appellees' Brief* at 22-26.

The multitude of cases recognizing the appellees' rights to recover in this case under "reverse condemnation" must have been overlooked by the majority because the *topic* is not even discussed in the Opinion. We believe that, when citizens of the Commonwealth allege a violation of their

constitutional rights, this Court has an obligation to explain to those citizens the basis of its decision denying those rights. However, such an explanation is not offered in the majority Opinion.

Also, under the Fifth and Fourteenth Amendments of the Constitution the United States, a disturbance of drainage rights by a governmental entity is an unconstitutional taking that must be compensated.

CONCLUSION

One dissenting opinion suggested that the real basis for this Court's Opinion is not a deference to constitutional principles, but rather a fear that MSD or other like governmental entities will become insolvent because of an imposition of tort liability. The Appellees can only trust that this Court would not engage in such a questionable judicial device. If bankruptcy of governmental entities is the concern that justifies denying the citizens of this Commonwealth a remedy for ordinary torts, then this concern should be explicitly stated. However, nothing in the record of this case suggests that MSD has even a remote chance of bankruptcy because of this action; on the other hand, it is a certainty that injustice will be imposed upon 2,000 people unless the decision of the Court of Appeals is affirmed. When the certainty of this injustice is weighed against the remote and speculative possibility of MSD's supposed bankruptcy, a ruling for Appellees represents the only fair resolution.

MSD is an "other municipality" under *Rash, supra;* its *Gnau* immunity was taken away by *Haney* and *Kirk, supra;* and its municipal liability restated in *Gas Service Co.* If this Court does not want to deal with those immunity-abolishing cases, this Court can at least afford the appellees

their constitutional "day in court" for reverse condemnation damages.

We earnestly pray that the April 30 Opinion be withdrawn and a new one written, either recognizing the appellee's right to maintain a negligence action, and/or to an action in reverse condemnation.

* * * * * * *

JEFFERSON CIRCUIT COURT

FIRST DIVISION

Nos. 83CI-04865, 83CI-03403, 83CI-05694, 83CI-90127 (Consolidated)

BRENDA SIMPSON, ROBERT T. SIMPSON, RUDOLPH V. ADAMS, EVA AMMON, ALMA BAGBY, FRED BLAINE, ROBERT & CHARLSIE BOOKER, LARRY BREWER, JOSEPH L. & CONSTANCE M. BROCK, GEORGE BURNEY, THOMAS L. & CORDELIA BURTON, LILLIE CHANDLER, WALTER R. CROSBY, SR., Individually and as Representatives of a Class of Persons Damaged on or about May 1, 1983 Due to a Flood Occurring in Jefferson County Kentucky; and

JOHN D. & SHARON M. BORDERS, BERNARD & ELMA E. BURDEN, DELBERT R. VANCE, Individually and

HELEN RAMSEY, LARRY G. & CECILIA RHODES, MR. & MRS. THOMAS THOMAS, PAMELA R. WEBB, Individually, - - - - - - - *Plaintiffs*

v.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, and PRC ENGINEERING, INC. - - - - *Defendants*

FIRST AMENDED CONSOLIDATED COMPLAINT

Serve: Secretary of State
Commonwealth of Kentucky
for mailing pursuant to KRS § 454.210 to:

Prentice Hall Corp.
222 West Adams Street
Chicago, Illinois 60606

* * * * * * *

Pursuant to CR 15.01, the Plaintiffs herein file their *First Amended Consolidated Complaint* as follows:

1. Plaintiffs, at all times relevant to the above-styled action, owned property which was damaged in Jefferson County, Kentucky.

2. Plaintiffs, except those Plaintiffs suing individually as listed in the style of this Complaint, bring this action for themselves and on behalf of a Class of similarly situated persons who sustained damage to real and personal property by a flood which occurred on or about May 1, 1983 in the portion of Jefferson County in the Southwestern Outfall area of Defendant, Louisville and Jefferson County Metropolitan Sewer District (hereafter, "MSD"). (As hereinafter used, "Plaintiffs" means the individually named Plaintiffs and the members of the Class.) A map of the affected area is attached hereto as Exhibit "A".

* * * * * * *

[COUNT I]

5. The construction of the sluice gates prevented the Ohio River from flooding sections of the Southwestern Pumping Station; but at the same time, the sluice gates made flooding of the Plaintiffs' property, due to sewage backup, likely during periods of reasonably anticipated and/or foreseeable rainfall.

6. On or about May 1, 1983, Plaintiffs suffered extensive flooding of which the failure of MSD's sluice gates was a substantial factor.

7. The construction of the sluice gates by MSD resulted on May 1, 1983 in an impairment to a dedicated

course of drainage of sewage and stormwater from Plaintiff's property. Such impairment obviously placed upon Plaintiffs a substantial and additional burden in the use of their property.

8. This common law right of drainage from Plaintiffs' property was wrongfully, unlawfully and unconstitutionally taken, damaged and otherwise devalued by MSD's construction, maintenance and operation of the sluice gates.

9. Plaintiffs suffered approximately $6,200,000.00 in damages as a result of MSD's unlawful taking of and damage to their property. Plaintiffs pray leave of Court to amend this Complaint after the exact amount of damage has been determined.

* * * * * * *

[COUNT VIII]

* * * * * * *

2. As a result of the actions by MSD described above, MSD violated 42 U.S.C. § 1983 by depriving the Plaintiffs under the color of state law of their right and privilege to hold property.

3. As a direct and proximate result if MSD's violation of 42 U.S.C. § 1983, Plaintiffs suffered damages in the amount set forth above.

WHEREFORE, Plaintiffs, suing on behalf of themselves and all other persons similarly situated, demand joint and several judgment against Defendants, Louisville and Jefferson County Metropolitan Sewer District, and PRC Engineering, Inc., as follows:

a. Compensatory damages in the approximate amount of $6,200,000.00 with leave of Court to amend this Complaint after the exact amount of damage has been determined.

b. Trial by jury;

c. Costs, including attorney's fees and expenses, expended herein by the Plaintiffs and their Class; and

d. All other relief to which the Plaintiffs and the Class may be entitled.